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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 584 MISC.

JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

Petitioners,

v.

HONORABLE CHARLES C. SIMONS, CHIEF JUDGE, and HONORABLE SHACKELFORD MILLER, JR., and HONORABLE FLORENCE E. ALLEN, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Respondents.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

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Counter-Statement as to Opinions Below

See also Appeal of *U. S. Securities & Exchange Commission* (C.A. 6, 1955) 226 F 2d 501; nine copies filed in connection with our brief in opposition to certiorari application No. 837.

Counter-Statement of the Case

The petitioners (plaintiffs below) had moved for a summary judgment, assigning numerous grounds and various theories. They were met by defenses both of fact and of law. As to most of the motion, the District Judge found that there were genuine issues as to material facts, and he refused summary judgment, reserving the issues for

trial. The Court of Appeals finds no error and remands the case so that trial can be had.

On part of their motion the petitioners prevailed and recovered a partial summary judgment. The Court of Appeals finds error in that the lower court overlooked genuine issues as to material facts and remands the case for trial. The Court of Appeals further comments that the issues are so interwoven that the case is not suitable for partial summary judgment procedure and should be tried on the merits as a unit.

Petitioners now move this court for leave to file a petition for a writ of mandamus to compel the Court of Appeals to state how it would have decided various legal questions had the disputed facts been resolved according to petitioners' contentions.

We state our contentions as to the facts (with record citations) in our brief in opposition to the companion certiorari application (No. 837).

Counter-Statement of Questions Presented

If there has been error below, will not the certiorari application (No. 837) afford the petitioners adequate relief? And what should the Court of Appeals have done other than what it did do?

ARGUMENT

Mandamus is not a proper remedy when some other appellate remedy is available:

Ex parte Fahey (1946) 332 U.S. 258;
Ex parte Baldwin (1933) 291 U.S. 610.

Mandamus is not a proper remedy to correct legal error:

Parr v. United States (1955) 351 U.S. 513;
Bankers Life and Casualty Company v. Holland (1953) 346 U.S. 379;
Interstate Commerce Commission v. United States (1932) 289 U.S. 385;
In re Park & Tilford (1917) 245 U.S. 82;
Ex part First National Bank of Dexter (1912) 228 U.S. 516.

Petitioners seem to concede (p. 11 of the petition) that if they can have certiorari they need nothing more.

The petition for mandamus inaccurately and very unfairly leaves the impression that some lower court has prevented petitioners from proceeding to trial; and they cite *Williams v. Simons* (1957) 355 U.S. , 2 L. Ed. (2d) 87 where a District Court restraining order was supposed to have delayed a trial in the state court. No such thing has occurred here. Petitioners tried the case, obtained a judgment, lost it because of errors of the court and of counsel (*Knapp v. Kinsey* [C.A. 6, 1956] 232 F 2d 458) and on May 1, 1958 the case stood ready for trial a second time.

Instead of proceeding to trial, the petitioners have consumed two entire years with a motion by them for rehearing (denied 235 F 2d 129), their former certiorari application (denied 353 U.S. 802), their extremely long requests for admissions of fact (19b-130b, 131b-201b), their new amended complaint (19a-97a), and their motion for partial summary judgment (165a-173a) which was granted July 30, 1957 (154 F. Supp. 263), argued on appeal October 21, 1957 and reversed December 6, 1957 (249 F 2d 797). The District Court thereupon set the case down to be tried on February 18, 1958 and had petitioners been willing the trial would have been completed by now. Instead

there has been another petitioners' motion for rehearing (denied January 31, 1958), another petitioners' certiorari application (No. 837 now pending) and a stay of proceedings pending the application, which stay was granted by the Court of Appeals on petitioners' application. Should certiorari be allowed or an order to show cause made on the mandamus petition, the trial will be delayed further.

The petitioners are correct in saying that there has been a great deal of delay, but they are wrong in blaming anyone except themselves.

On page 13 of the petition it is proposed that the Court of Appeals be commanded to answer four questions, the first two of which are as follows:

> (a) Did the voting trust agreement violate the fiduciary duties and obligations of the defendant officers-directors to the corporation, its stockholders generally, and to petitioners?
>
> (b) Did it violate the state and federal laws proscribing price-fixing and restraint of trade, and the Michigan law as to restraint on alienation of property?

These are questions that the District Court had declared itself unable to pass on in the absence of evidence (petitioners' appendix 139-143; *Kinsey v. Knapp* [E.D. Mich. 1957] 154 F.S. 263 at 265-268). Technically the Court of Appeals could do nothing here since the District Court's refusal to enter a summary judgment based on these issues is not a final and appealable order. *John Hancock Mutual Life Insurance Company v. Kraft* (C.A. 2, 1953) 201 F 2d 952; *McGrath v. Hunt* (C.A. 2, 1952), 194 F 2d 529; *Morgenstern Chemical Co. v. Schering Corporation* (C.A. 2, 1950) 181 F 2d 160; *Jones v. St. Paul Fire & Marine Insurance Company* (C.A. 5, 1939) 108 F 2d 123. Passing the question of finality, the disputed fact questions are pointed out and discussed in both lower courts' opinions (154 F Supp. 263 and 249 F 2d 797) and the record fully agrees.

The third question claimed to be unanswered (petition, page 13) is

> (c) Were the issuance and delivery of the voting trust certificates in violation of the federal and state laws in respect of securities?

In the context of this case this involves (among other things) deciding whether certain transactions within a closed group amounted to a public offering of securities, the controlling facts being disputed. The Court of Appeals has ordered the evidence heard and has remanded the case so that an adequate record can be made and brought up to it. Its opinion fully discloses that it should have done nothing else unless it was willing both to act as a court of first instance and to try the case on affidavits.

The final so-called unanswered question (petition, page 13) is

> (d) Were petitioners entitled to the summary judgment for which they moved?

which has of course been specifically and emphatically answered in the negative by the Court of Appeals.

For our detailed version of the facts and particularly the time-table indicating who is responsible for the delay complained of, see our brief in opposition to the certiorari petition (No. 837) filed herewith. We urge that leave to file the petition for mandamus be denied.

Dated: Detroit, Michigan, March 31, 1958.

Respectfully submitted,

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